Petition

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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JAMES C. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA, JAMES SCHLESINGER, JOHN L. McLUCAS, GEORGE SCHAFER, HENRY VAN DePOL, HAROLD W. DEITZ, In Their Official Capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the action of the United States Court of Appeals for the Sixth Circuit in affirming the District Court's grant of summary judgment for Respondents was in violation of Rule 56 of the Federal Rules of Civil Procedure and of the Due Process Clause of the Fifth Amendment of the United States Constitution.

PARTIES

All parties to this cause appear in the caption of the case in this Court.

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IN THE

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OCTOBER TERM, 1981

JAMES C. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA, JAMES SCHLESINGER, JOHN L. McLUCAS, GEORGE SCHAFER, HENRY VAN DePOL, HAROLD W. DEITZ, In Their Official Capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The decision of the United States District Court for the Western District of Tennessee, dated December 20, 1979, is unreported, but it is reproduced in the Appendix (App. at A-11). The decision of the United States Court of Appeals for the Sixth Circuit, dated June 23, 1981, and that Court's August 18, 1981 Order denying the Petition for Rehearing have not been officially reported, but they are reproduced herein the Appendix. (App. at A-1 and A-6).

JURISDICTION

Petitioner seeks review of the Judgment of the United States Court of Appeals for the Sixth Circuit, entered on

June 23, 1981, (App. at 6), which affirmed the District Court's grant of summary judgment to Respondent, and of the Court of Appeals' Order Denying Petition for Rehearing, entered on August 18, 1981. (App. at A-1).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

1. The Fifth Amendment to the United States Constitution, which provides in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. The Administrative Procedure Act, 5 U.S.C. §706, the text of which appears in the Appendix at A-39.

3. The United States Air Force Manual (AFM) 160-1, paragraph 4-20b(2)

> 4-20 *Cardiovascular System.* Causes for rejection:
>
> b. *Flying, Classes II and III.* Same as "a". In addition:
>
> (2) All electrocardiographic tracings read as "abnormal" by the USAF Central Electrocardiographic Library, until cardiac evaluation by the USAF School of Aerospace Medicine has ruled out cardiac disease.

STATEMENT OF THE CASE

Petitioner's primary substantive contention is that Respondents wrongfully, and without affording due process to Petitioner, sought to force Petitioner to submit to invasive and hazardous medical procedures and denied him active flying status with the Air Force Reserves. (App. at A-36-37). Petitioner was grounded because of his failure to comply with requests or directives that he participate in a "study group" at the United States Air Force School of Aerospace Medicine (hereinafter "USAF-SAM") at Brooks Air Force Base, Texas. (App. at A-14). The study group was known as the "Left Bundle Branch Block Clinical Study Group." Respondents sought Petitioner's participation in the study group following a flight physical which Respondents claim revealed an irregularity in Petitioner's electrocardiogram. (App. at A-6). Petitioner believed that participation in the ten-day residential study group would involve medical experimentation which was unnecessary to determine whether Petitioner was qualified for active flying status, and which would subject Petitioner to unreasonable and unnecessary physical risks in violation of his Constitutional rights. (App. at A-23, 36-37). Therefore Petitioner sought to establish his fitness and qualification for active flying status by submitting to full examination by a qualified private cardiological clinic. The USAF-SAM, based on its own evaluation of the results of this examination at the private clinic, granted Petitioner permission to continue flying military missions, thereby admitting that this examination established Petitioner's cardiological fitness. (App. at 14-15). However, nine months later, Respondents again insisted that Petitioner participate in ten days of unspecified medical

testing and experimentation at the USAF-SAM even though Petitioner submitted further military and civilian medical proof of his continued good health. Based solely upon Petitioner's failure to join the Air Force study group, Respondents grounded and reassigned Petitioner.

Petitioner sought to challenge the action of Respondents by filing suit in the United States District Court for the Western District of Tennessee. Respondents filed a Motion to Dismiss or in the Alternative for Summary Judgment. A hearing was scheduled on this Motion. It was the understanding of Petitioner and his attorneys that the only issues to be addressed at that hearing were issues related to jurisdiction and scope of review (including alleged failure to exhaust administrative remedies). These were the only issues addressed by Petitioner and Respondents in their memoranda filed prior to the hearing. (App. at A-27 and 31). The parties suspended discovery on issues relating to the ultimate merits of the case until these threshold issues relating to jurisdiction and scope of review were resolved. This understanding was confirmed by remarks made by the U. S. District Judge from the bench in the course of the hearing. (App. at A-23-24). Following the hearing, twenty-six (26) months elapsed before the District Court issued its ruling. In that ruling, while holding in Petitioner's favor that the court did have jurisdiction of the matter and that the case was within the scope of judicial review, the District Court went on to decide the case on the merits, granting summary judgment to the Respondents. (App. at A-11).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT BECAUSE THE RECORD BEFORE THE DISTRICT COURT WAS NOT ADEQUATE TO SUPPORT THE JUDGMENT.

A. *Record in the Instant Case.*

Petitioner's Complaint is the only sworn proof in the District Court record with respect to the truth or falsity of the issues decided by the District Court in granting summary judgment.[1] (App. at A-38). Respondents' Answer is unsworn and there is no sworn proof contained in or attached to any other pleading or document filed in this cause. There are no affidavits, depositions or answers to interrogatories in the record. The only items contained in the District Court record, other than the Complaint, which the District Court might have regarded as proof, are certain exhibits filed by Respondents, including extracts of personnel records, the administrative file maintained by the Office of the Surgeon General, and portions of the Air Force Manual. (App. at A-5, 7). These exhibits were verified only as being true and accurate copies. (App. at A-7). There had been no hearing and no findings of fact at the administrative level, so these exhibits included only unsworn, conclusory letters and internal memoranda. (App. at A-4, 7).

It is clear, therefore, that the record before the District Court provided a wholly inadequate basis upon which to

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[1]It should be noted that the oath to the Complaint is on information and belief.

grant summary judgment. The record contained so little proof because the issues at the hearing in the District Court were restricted to jurisdiction and scope of review. Respondents' memorandum in support of its motion argued only that the District Court did not have jurisdiction on the bases set forth in the Complaint, that Petitioner had failed to exhaust administrative remedies and that military decisions were beyond judicial reviewability. (App. at 27-30). Petitioner's memorandum in opposition to the motion responded only to these arguments. (App. at A-31-35).

The District Court and the parties agreed prior to the hearing on the motion that discovery would be postponed until the threshold issues raised by Respondents in their motion were resolved. This agreement is reflected in the following excerpt from the hearing on the motion in the District Court:

> Now if I overrule this Motion how much preparation is necessary? Mr. Garthright [Petitioner's trial attorney], I have a hazy recollection that you told me on a prior appearance that there is good bit of discovery that needs to be done.
>
> MR. GARTHRIGHT: Yes, sir.
>
> THE COURT: None of it has been done because of this Motion?
>
> MR. GARTHRIGHT: That's why we discussed with Your Honor prior to this hearing and Your Honor agreed it would be inappropriate to do that wide-spread medical discovery before we determined if we had a right to be here.
>
> (App. at A-23-24).

Although the District Court indicated from the bench during the hearing that it already had prepared a draft Order (App. at A-23), the final Order was not released for twenty-six (26) months. The Order ruled in favor of Petitioner on every issue briefed by the parties. Specifically, the District Court held that jurisdiction was present under the Administrative Procedure Act, that administrative remedies had been exhausted and that this was a proper case for the exercise of judicial review. (App. at A-11-13). However, the District Court then went beyond those issues to rule, *on the merits*, that there were no material issues of fact and that Respondents were entitled to judgment as a matter of law. (App. at A-17-18).

B. *Rule 56, Federal Rules of Civil Procedure.*

On numerous occasions where District Courts have granted summary judgments under Rule 56 of the Federal Rules of Civil Procedure without giving the parties opposing the motion a fair opportunity to carry out discovery, appellate courts have reversed the grants, holding that the parties must be given a reasonable opportunity to present their cases.

For example, in *Habib v. Raytheon Company*, 616 F.2d 1204 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's grant of summary judgment. The party opposing the motion had not taken discovery for the purpose of developing facts necessary to oppose the motion. The Court of Appeals stated that the District Court has "two options when a party opposing a summary judgment cannot

present . . . facts essential to justify his opposition" due to a lack of discovery:

> [T]*he first is to deny the summary judgment, and the second is to allow discovery.*
>
> *Id.* at 1210. (Emphasis added).

Similarly, the United States Court of Appeals for the Second Circuit reversed a summary judgment granted by the District Court in *Herzog & Straus v. GRT Corporation*, 553 F.2d 789 (2nd Cir. 1977), where the parties were prepared only for a hearing on a preliminary injunction. The Court of Appeals stated that the appellant "should have been given an opportunity to develop its alternative theory" and should have been given a chance to "amend its pleadings if necessary or to develop the facts sufficiently to enable it to sustain its case . . ." *Id* at 791-792.

The United States Court of Appeals for the Third Circuit reversed a summary judgment granted by the District Court on the basis of an inadequate record in *Season-All Industries v. Turkiye*, 425 F.2d 34 (3rd Cir. 1970). The District Court had granted a summary judgment based on the motions and memoranda in support thereof. Just as in the present case, the discovery process had been informally stayed. The Court of Appeals stated:

> Here in a factually murky situation, with plaintiff's efforts to obtain answers to its interrogatories and to take depositions balked by motions for protective orders which were undecided, it was error to enter summary judgment.
>
> *Id.* at 39.

The Third Circuit noted that it is undesirable in general

for a District Court to grant summary judgment without making it clear that summary judgment is being considered and that all factual proof should be submitted.

> Moreover, we believe that it is undesirable in general for a district court to enter summary judgment . . . unless it makes it clear in its order that all affidavits and counter-affidavits must be filed with the briefs.

Id. at 39.

> [Summary judgment should not be granted] unless it is made clear beyond all doubt that the parties must present their affidavits and counter-affidavits in addition to whatever facts appear in the pleadings, depositions, answers to interrogatories, and admissions on file. Only then will it be proper to determine whether a genuine issue of fact exists which requires a trial.

Id. at 39-40

Again, the Third Circuit in *Lockhart v. Hoenstine*, 411 F.2d 455 (3rd Cir. 1969), stated that a District Court has a duty:

> . . . to see that the parties have been given a reasonable opportunity to make their record complete or explain their inability to do so before ruling on a motion for summary judgment.

Id. at 459.

In *Mannington Mills v. Congoleum*, 610 F.2d 1059 (3rd Cir. 1979), the District Court dismissed some of plaintiff's claims and granted summary judgment to the defendant on other claims. The United States Court of Appeals for the

Third Circuit reversed the summary judgment, stating that the plaintiff had not been given a sufficient opportunity for discovery on those points.

> Mannington also argues, however, that the District Judge acted prematurely by ruling on the summary judgment motion before Mannington had had a fair opportunity to depose the officers and employees of Congoleum regarding the existence of an agreement between Congoleum and its licensees. We agree.
>
> *Id.* at 1073

In *Davis v. Howard*, 561 F.2d 565 (5th Cir. 1977), the District Court in a hearing scheduled on a Rule 12(b)(6) motion, converted the motion into a Rule 56 motion for summary judgment and granted the summary judgment. The United States Court of Appeals for the Fifth Circuit vacated the judgment, indicating that the District Court should have made its intention to rule on the merits of the case known to the parties and the parties should have had an opportunity to offer proof.

> ...[T]*he record must adequately demonstrate that all counsel were aware of the intentions of the district judge* to treat the motions as converted, together with a *reasonable opportunity afforded to the non-moving party* to present, by way of affidavit or otherwise, anything necessary to rebut the contention of the moving party. This does not appear in the instant case...
>
> *Id.* at 571. (Emphasis added).
>
> ...[T]here can never be a wide overview by the trial court, beyond the pleadings to include mat-

> ters outside, without affording *all litigants the opportunity to offer their perspectives* on the additional matter by way of admissible evidence.
>
> The bridling devices at issue here sustain and insure the most elementary operation of our civil law. *The concepts of notice, admissibility, and opportunity to be heard are ancient primaries.*
>
> *Id.* at 572. (Emphasis added).

In *Mitchell v. Beaubouef*, 581 F.2d 412 (5th Cir. 1978), the United States Court of Appeals for the Fifth Circuit considered a summary judgment granted on the basis of an unverified administrative report, similar to the administrative record which is the basis of the summary judgment in the present case. The Fifth Circuit stated:

> [W]e cannot countenance the use of this summary procedure utilized in this case. This case was summarily dismissed on the merits on the basis of the unverified administrative report submitted to the magistrate. Although we have recognized that such reports may aid the District Court in framing the issues for trial or summary disposition . . . they cannot be used to circumvent the summary judgment requirements of Rule 56, Federal Rules of Civil Procedure.
>
> *Id.* at 515.

The United States Court of Appeals for the Fifth Circuit also reversed a summary judgment granted by the District Court in *Underwood v. Hunter*, 604 F.2d 367 (5th Cir. 1979). As in the present case, the parties were surprised

by the grant of summary judgment on the broad merits of the case.

> Here the plaintiffs had no indication that a summary judgment, a final judgment, might result from the preliminary injunction hearing. The first indication that the materials produced for the hearing would be used to support a summary judgment was the Court's order of dismissal . . .
>
> Appellants thus must have an opportunity to present additional material in arguments going to the issue of summary judgment. It may be that they have already provided everything that they have, but as we observed in Georgia Southern [*Georgia Southern v. Atlantic Coast*, 373 F.2d 493 (1967), *cert. denied*, 389 U.S. 851 (1967)] "When such a limited adjudication . . . is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available." 373 F.2d at 489.
>
> *Id.* at 369.

In *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962), the United States Court of Appeals for the Sixth Circuit reversed a grant of summary judgment on the ground that the record was inadequate.

> In the present case, except for a short stipulation which did not cover all of the facts, we have only

> affidavits submitted by the parties from which conflicting inferences can be drawn.
>
> *Id.* at 427.

The Sixth Circuit went on to state that the District Court should have had the "opportunity to consider the testimony of witnesses, instead of affidavits" and that discovery procedures should have been available. *Id.* at 427. The factual situation would have been better developed "through the usual trial procedure." *Id.* at 427.

In *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957), the United States Court of Appeals for the Sixth Circuit again reversed a grant of summary judgment because the record was inadequate.

> [C]ases in which we held that summary judgment proceedings did not afford the losing party an adequate opportunity to develop the facts and should not have been used are *Estepp v. Norfolk & Western Railway Company*, 6th Cir., 192 F.2d 889; *Bellak v. United Home Life Insurance Company*, 6th Cir., 211 F.2d 280, 283 and *Hoy v. Progress Pattern Company*, 6th Cir., 217 F.2d 701, 704.
>
> *Id.* at 802.

C. *Due Process Clause of Fifth Amendment.*

In the instant case, the denial by the District Court of a reasonable and fair opportunity for Petitioner to present facts relating to his substantive claims prior to the grant of summary judgment violates not only Rule 56 of the Federal Rules of Civil Procedure, but also the requirements of procedural due process under the Fifth Amendment to the

United States Constitution. The centrality of procedural due process in our system of dispute settlement was recognized by this Court in *Boddie v. Connecticut*, 401 U.S. 371 (1972).

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.
>
> *Id.* at 375.

Summary judgment cannot be granted without a "reasonable" and "fair" opportunity for the non-moving

party to present proof. *Lockhart v. Hoenstine*, 411 F.2d at 459; *Mannington Mills v. Congoleum*, 610 F.2d at 1073; and *Davis v. Howard*, 561 F.2d at 571. This opportunity to be heard is at the core of Petitioner's right to procedural due process:

> "[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. at 377.
>
> '[T]here can be no doubt that at a minimum [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'
>
> . . . What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.' (Emphasis added by the Court).
>
> *Id.* at 378, quoting from *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The United States Court of Appeals for the Sixth Circuit has acknowledged that an adequate factual basis is particularly essential when important and complex issues such as questions of Constitutional rights are involved in *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976).

> As we have stated on many occasions, without an adequate factual basis in the record, a District

> Court should be extremely hesitant to grant summary judgment on important and complex issues. See e.g. *Tee-Pak, Inc. v. St. Regis Paper Company*, 491 F.2d 1193 (6th Cir. 1974). *See* generally 6 Moore Section 1.06 at 2305. *The adequacy of the record is particularly important where the court is called on to decide questions of constitutional law without benefit of a trial.*
>
> *Id.* at 1135. (Emphasis added).

D. *Petitioner Was Not Afforded The Opportunity To Develop The Record In Support of His Constitutional Claims.*

In its original opinion in this cause entered on June 23, 1981, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding that there were no issues of fact arising under the Air Force regulations. In that order, however, Sixth Circuit declined to address the additional issue whether there was an adequate record to support a summary dismissal of Petitioner's *constitutional* claims, because the Court found that Petitioner "did not assert his constitutional claim in response to the motion for summary judgment. . . ." (App. at A-8). This finding by the Sixth Circuit subsequently was modified in its opinion on the Petition for Rehearing, which was entered on August 18, 1981. In the latter opinion, the Sixth Circuit in effect acknowledged the error in its previous opinion, stating as follows:

> Appellant did argue that under the A.P.A. the District Court should have considered whether or not the agency action was contrary to constitutional right, power, or privilege. *See* 5 U.S.C. §706

> (2)(B). In his brief to this Court on appeal, appellant argued that the Air Force decision to require appellant to undergo testing at the School of Aerospace Medicine and to ground appellant for refusal to participate in those tests violated appellant's procedural and substantive due process rights and deprived appellant of liability and property interests.
>
> (App. at A-3).

However, the Sixth Circuit then proceeded to characterize Petitioner's constitutional claims incorrectly as "a claim of entitlement to fly with a waiver" (App. at A-3), and dismissed them summarily as not falling within any liberty or property interest protected by the Constitution. In fact, Petitioner's primary constitutional claim is that the right not to be subjected arbitrarily to medical experimentation involving bodily intrusion is a liberty right secured by the Due Process Clause of the Fifth Amendment. In so ruling, the Sixth Circuit only compounded the error committed originally by the District Court, namely, rejecting Petitioner's constitutional claims before affording him any reasonable and fair opportunity to develop those claims through the orderly process of pre-trial discovery.

With respect to the constitutional rights of military personnel, *Parker v. Levy*, 417 U.S. 733 (1974); *Middendorf v. Henry*, 425 U.S. 25 (1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). A military regulation clearly can violate the constitutional rights of military personnel, *Robinson v. Rand*, 340 F. Supp. 37 (D.C. Colo. 1972); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), *cert. den.*, 409 U.S. 1076 (1973); *O'Neill v. Dent*, 364 F. Supp. 565 (E.D. N.Y. 1973).

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE GRANT OF SUMMARY JUDGMENT BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT IN THE RECORD BEFORE THE DISTRICT COURT.

A. *The Record Contained Genuine Issues of Material Fact.*

As discussed above, the record before the District Court in this cause was not adequate to justify consideration of a motion for summary judgment. However, even if the record on its face were considered adequate, there were many genuine issues of material fact raised by the pleadings and documents before the District Court, and Respondents therefore were not entitled to judgment as a matter of law. Questions of material fact which were genuinely at issue included: whether Petitioner was qualified for active flying status; whether the civilian and military medical evidence supported any change in Petitioner's flying status; whether Petitioner had established through civilian tests his medical fitness for flight duty; whether the Air Force had acknowledged Petitioner's medical fitness for flight duty; whether the Air Force had, by granting Petitioner a waiver based upon an Air Force evaluation of the civilian tests, admitted that those tests established Petitioner's fitness; whether the Air Force waiver fulfilled the requirement of AFM-160-1 4-20(b)(2) of a cardiac evaluation "by" (as distinguished from "at") the USAF-School of Aerospace Medicine; whether the refusal to grant Petitioner a continued medical waiver, thereby disqualifying him from active flying status, was actually based on his purported heart condition; whether

Respondents' actions in refusing to extend Petitioner's medical waiver were properly motivated; whether the study group program in fact was reasonably calculated to determine a participant's fitness for active flying duty; whether the study group program addressed issues which could be resolved only through resort to medical experimentation; whether the study group program was of an experimental and dangerous nature; and whether the study group program would subject Petitioner to unreasonable and unnecessary physical risks.

These genuine issues of material fact were apparent from the record before the District Court and their existence was expressly acknowledged in the hearing by the District Judge:

> The Plaintiff says, "it is not an examination at all, that what is meant by examination has been furnished and will be furnished by — we are not going to be put into —" well, Mr. Garthright keeps using the word guinea pig. It is hard for me to conceive of that, I don't believe they are going to do some things like the C.I.A. are supposed to be doing. In any event there is a factual dispute there. . . . I am inclined to think that I can't grant a Motion to Dismiss or Motion for Summary Judgment under the medical part in the face of this factual dispute.
>
> (App. at A-22).

B. *Existence of Genuine Issues of Material Fact Precludes Summary Judgment.*

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> (c) *Motion and Proceedings Thereon* . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620 (1943), this Court reversed a decision of the United States Court of Appeals for the Fourth Circuit, which had affirmed a summary judgment for defendants based upon eight affidavits, a stipulation of facts and several exhibits. This Court stated that the stipulation and affidavits contained "some, although far from conclusive, evidence . . . that supports plaintiff's case," (*Id.* at 628), and said:

> The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.
>
> *Id.* at 627.
>
> It may well be that the weight of the evidence would be found on a trial to be with defendant.

> But [the Court] may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed.

Id. at 628.

This Court again reversed a decision of the United States Court of Appeals for the District of Columbia Circuit, which had affirmed a District Court grant of summary judgment in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962). In so ruling, this Court said that the truth must appear "quite clear" for summary judgment to be granted and that:

> It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even-handed justice."

Id. at 473.

Even inferences to be drawn from undisputed facts are to be "viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962). In *Diebold* this Court reversed the United States Court of Appeals for the Sixth Circuit, which had affirmed a grant of summary judgment by the United States District Court for the Southern District of Ohio. This Court stated that the findings of the District Court:

> . . . represent[ed] a choice of inferences to be

> drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue . . . it was improper for the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c).
>
> *Id.* at 655.

The moving party bears the burden of showing the absence of any genuine issue of material fact. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968) and *Adickes v. Kress*, 398 U.S. 144 (1970). Summary judgment can be granted only if the record is "quite clear" and if the moving party has shown "conclusively" by "overwhelming evidence" that no facts supporting the other party's position exist. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627 (1943) and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

III.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit, in affirming the summary judgment granted by the District Court herein, upon an inadequate record, and a record containing genuine issues of material fact, has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court in violation of Petitioner's rights under the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment to the United States Constitution.

This Petition for a Writ of Certiorari therefore should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed, via U. S. Mail, postage prepaid, to Joe Dycus, Esq., Assistant United States Attorney, 1028 Federal Building, Memphis, Tennessee 38103 this 13th day of November, 1981.

/s/ Sherrill A. Smith

Appendix

NO. 80-1150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES C. STEPHENS ..... *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA,
JAMES SCHLESINGER, JOHN L. McLUCAS,
GEORGE SCHAFER, HENRY VAN DEPOL,
HAROLD W. DIETZ,
in their official capacities ..... Defendants-Appellees

ORDER DENYING
PETITION FOR REHEARING

Before: LIVELY and KENNEDY, Circuit Judges, and CECIL, Senior Circuit Judge.

Plaintiff-appellant petitions this Court for rehearing or rehearing en banc. The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to this panel for disposition. Appellant argues that this Court erroneously upheld the decision of the District Court on three grounds: that this Court held appellant had not raised his constitutional issues in response to appellees' motion for summary judgment when appellant had; that material issues of fact existed on these constitutional claims and thus summary judgment against him was improper;

and that the evidence in the Air Force's administrative file relating to him would not have been admissible under Rules 801 or 803(8), Fed. R. Evid.

Appellant argues that he did present his constitutional claims in his memorandum in opposition to the motion for summary judgment, a document not included in the appendix. In his petition, appellant quotes his memorandum wherein he states that facts alleged in plaintiff's complaint regarding a deprivation of plaintiff's constitutional rights constitutes a federal question.

An appellant may rely upon parts of the record which are not included in the appendix. *See* Rule 30(a), Fed. R. App. Pro. In such a case, appellant may cite the page numbers in the transcript or the exhibit numbers on which they rely. *See Oliver v. Michigan State Board of Education*, 519 F.2d 619, 623 (6th Cir. 1975). But the appellant's brief on appeal must state the issues to be argued. *See* Rule 28(a)(2), Fed. R. App. Pro. An argument which is neither briefed nor argued to the Court of Appeals will not be reviewed by the Court of Appeals. *See Roberts v. Sawyer*, 252 F.2d 286, 287 (10th Cir. 1958); *C. & D. Motor Delivery Co. v. United States*, 150 F.2d 250, 253 (6th Cir. 1945). Nor will the appellate court consider an argument raised for the first time on appeal which was not presented to the trial court. *See Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, No. 79-1191, slip op. at 25 (6th Cir. May 18, 1981).

In the present case, appellant's complaint raised constitutional and statutory questions. The District Court held that jurisdiction was based only on the Administrative Procedure Act (A.P.A.) and rejected the other jurisdic-

tional bases asserted by the appellant. In his brief to this Court, appellant argued that the District Court erred in going beyond the jurisdictional question, which he asserted was the only question before the District Court, but appellant did not challenge the jurisdictional ruling of the District Court. Nor was the jurisdictional question raised as a ground for a new trial, rehearing, or amendment of the judgment in appellant's post-judgment motion. Thus, appellant cannot now argue that the jurisdiction should have been based upon the broader federal question jurisdiction.

Appellant did argue that under the A.P.A. the District Court should have considered whether or not the agency action was contrary to constitutional right, power, or privilege. *See* 5 U.S.C. §706(2)(B). In his brief to this Court on appeal, appellant argued that the Air Force decision to require appellant to undergo testing at the School of Aerospace Medicine and to ground appellant for refusal to participate in those tests violated appellant's procedural and substantive due process rights and deprived appellant of liberty and property interests.

Before one may be deprived of due process, one must be deprived of a liberty or property interest protected by the Constitution. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70, 573, 577 (1972). Appellant has not established either at the trial level or here his legitimate claim of entitlement to fly with a waiver. *See NeSmith v. Fulton*, 615 F.2d 196, 203 (5th Cir. 1980) (order dismissing challenge to denial of military reenlistment proper where plaintiff failed to prove in response to motion to dismiss that he had objective basis for legitimate entitlement to reenlistment).

Appellant argues that the determination that he had no constitutional right infringed was premature as the hearing was only on the jurisdictional question. The appellees' motion was one to dismiss the complaint on the ground that the Court lacked jurisdiction, that the complaint failed to state a cause of action, or that no material factual issues existed and appellees were entitled to judgment as a matter of law. From the transcript of the hearing, it is clear that the District Court was doing more than merely deciding if it had jurisdiction. The Court wanted the Air Force regulations to determine what the regulations required. It held jurisdiction existed only under the A.P.A. The Court did consider the medical question to be in dispute, but such a dispute would only be relevant if the appellees lost their motion based upon the content of the regulations. Because the regulations were not violated, the District Court held the Air Force did not act arbitrarily or capriciously and that the medical aspects were immaterial. We agreed. This Court also agrees with the District Court that the District Court did not misconstrue the record in this case as the parties were directed to bring to the hearing any documentary evidence needed to support their respective contentions raised by the motions of appellees.

Appellant argues that the evidence before the District Court would not have been admissible because the administrative file contained many internal Air Force letters which made unsubstantiated claims about the medical condition of Major Stephens. Therefore, appellant argues, the admission of the contents of the file without the accompaniment of a sworn affidavit was not harmless error.

This Court need not decide if everything in the administrative file was admissible under the Federal Rules of Evidence. Letters written by appellant were admissible as admissions under Rule 801(d)(2), Fed. R. Evid. The Air Force Rules were admissible as public records setting forth the activities of the office. Rule 803(8)(A), Fed. R. Evid. To the extent letters reported what happened — that appellant was requested to take the tests and refused and was subsequently denied a waiver — they would be admissible as public records of matters observed pursuant to duties imposed on the agency. Rule 803(8)(B), Fed. R. Evid. To the extent that any of the letters may have contained unsubstantiated references to appellant's medical condition, their admission would be harmless error, since this Court has held that the medical question was immaterial in view of the disposition of the case.

Since appellant has raised no issues that require rehearing, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

NO. 80-1150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES C. STEPHENS ..... Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
JAMES SCHLESINGER, JOHN L. McLUCAS,
GEORGE SCHAFER, HENRY VAN DEPOL,
HAROLD W. DIETZ,
in their official capacities ..... Defendants-Appellees

ORDER

Before: LIVELY and KENNEDY, Circuit Judges, and CECIL, Senior Circuit Judge.

Plaintiff-appellant appeals the decision of the District Court which granted the defendants-appellees' motion for summary judgment. Appellant argues the grant of summary judgment on the record that was before the court below was improper as the record was inadequate to sustain a motion for summary judgment. Appellant further argues the court below erred in only applying the arbitrary and capricious standard to the agency action in question.

Prior to 1972, appellant was a pilot with the United States Air Force Reserve. Irregularities appeared in his electrocardiogram during a physical in fall 1972. Appellant had several private doctors examine him. A waiver was granted with an expiration date nine months later which allowed him to continue flying. The Air Force refused to

issue another waiver at the end of nine-month period because appellant had not undergone testing at the Air Force School of Aerospace Medicine.

The District Court stated in its written opinion filed December 20, 1979 that appellant was only claiming that the requirement imposed upon him was contrary to Air Force Regulations. The court found no disputed facts as to the content of the regulations. Under those regulations, appellant was required to submit to an examination at the School of Aerospace Medicine before obtaining a waiver. Since appellant refused to submit to such an examination, summary judgment was granted for appellee.

Appellant argues that there are disputed issues of fact whether or not the regulations were followed in the present case. Further, the certified records of the Air Force Regulations and the file in this case were not accompanied by a sworn affidavit and thus could not be considered on a motion for summary judgment. He argues that he raised the issue whether or not the regulations (as they stand or as applied) violated appellant's constitutional rights.

The certified administrative record and copies of the Air Force regulations should have been attached to a sworn affidavit. *See* Rule 56(c) and (e), Fed. R. Civ. Pro.; *Mitchell v. Beaubouef*, 581 F.2d 412, 415 (5th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979). The opponent of a motion for summary judgment does not have to present affirmative proof. But if the documents already before the court do not show an issue of disputed fact, then summary judgment is appropriate for the movant. *See Smith v. Hudson*, 600 F.2d 60, 64-65 (6th Cir.) *cert. dismissed*, 444 U.S. 986 (1979); Rule 56(e), Fed. R. Civ. Pro.

In the present case, on the record before the District Court, the undisputed facts were that the Air Force required appellant to undergo the testing and appellant refused to do so. The Air Force's position was entirely consistent with its regulations — there is no evidence in the record to suggest otherwise. Although the certified copies of the record and the regulations should have been attached to an affidavit, this error was harmless given that the same documents would be admissible as admissions by the party opponent, Rule 801(d)(2), Fed. R. Evid., or as public records or reports, Rule 803(8), Fed. R. Evid. Thus, the failure to introduce the documents as attachments of a sworn affidavit was harmless error.

Since appellant did not assert his constitutional claim in response to the motion for summary judgment, the lower court did not err in failing to consider the constitutional questions. It correctly applied the arbitrary and capricious standard in reviewing the agency action. We affirm for the reasons stated by the District Court in its opinion of December 29, 1979.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman, Clerk

ORDER ON MOTION FOR NEW TRIAL, REHEARING, OR TO ALTER OR AMEND JUDGMENT

This Court entered a ruling upon the defendants' motion for summary judgment on December 20, 1979, and pursuant thereto the Clerk entered a Judgment for the defendants on December 21, 1979. Subsequently the plaintiff filed a Motion for New Trial, Rehearing, or to Alter or Amend Judgment.

First among the grounds asserted for the motion for new trial are:

> That no fact hearing was ever had, and therefore no facts, under oath, were ever before the Court;

The record reflects that the attorney for the defendants caused to be filed on September 8, 1976, in support of the motion, certified copies of the following items:

> 1) Extracts of Official Personnel Records Group Pertaining to Major James C. Stephens, the plaintiff
>
> 2) The administrative file maintained by the office of the Surgeon General regarding the plaintiff
>
> 3) Chapter 4 of the Air Force Manual 160-1 dated 6 April 1971.

In the order setting the hearing on the motion this Court directed counsel to bring to the hearing any documentary evidence needed to support their respective contentions raised by the motions of the defendant. On the day of the hearing, August 12, 1977, there was also filed

a portion of Air Force Manual 160-1 which was entitled Medical Examination and Medical Standards.

Additionally the plaintiff asserts in support of his motion for new trial that this Court misconstrued and incorrectly interpreted the record in this case because the ruling of the Court was inconsistent with the arguments and memoranda of the parties and the conclusions of the Court do not follow the evidentiary material submitted, the applicable Air Force regulations and the law. This Court is of the opinion that this is merely an effort to reargue this complex matter. Errors of that nature should best be presented in an appeal from the Court's judgment.

IT IS THEREFORE ORDERED that the Motion for New Trial, Rehearing, or to Alter or Amend Judgment is hereby overruled.

ENTER: This 9th day of January 1980.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

RULING UPON MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

This action is before the Court on the defendants' Motion to Dismiss Or In The Alternative For Summary Judgment. The plaintiff, a pilot in the United States Air Force Reserve, brought this action to contest certain actions of Department of Defense and Air Force officials denying him flying status. Plaintiff claimed that defendants had arbitrarily and capriciously withheld a waiver from medical disability which would entitle him to maintain his flying status with the Air Force Reserves. Jurisdiction of the Court was sought pursuant to 5 U.S.C. §701, *et seq*, the Administrative Procedure Act (A.P.A.); 10 U.S.C. §1551, *et. seq.*; 28 U.S.C. §§1331, *et seq.*; 1343(f); 2201, *et seq.*, and 1361; and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Defendants have moved to dismiss the action pursuant to Rule 12(b) F. R. Civ. P. on the grounds that the Court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted. In the alternative, defendants move the Court to grant summary judgment in their favor pursuant to Federal Rule 56(c) on the grounds that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. Upon consideration of defendants' Motion to Dismiss, the response thereto and the applicable law, the Court finds that limited jurisdiction exists under the A.P.A. 5 U.S.C. 701, *et seq.*, to review the defendants' actions. The scope of review, as defined in §706 of the Act, will be restricted to determination of whether the defendants acted arbitrarily and capriciously in denying the plaintiff a waiver for his medical disability.

As a consequence of accepting jurisdiction only under the A.P.A., the other jurisdictional bases asserted by the plaintiff are necessarily rejected.

In the instant case, plaintiff does not seek relief for an abuse of discretion. Plaintiff alleged that defendants violated "a duty . . . to act in accordance with Air Force regulations . . . . [which] duty is not discretionary in application to plaintiff." Plaintiff's Memorandum in Response to Motion to Dismiss at 2.

Defendants have attempted to characterize the actions of the military personnel involved as totally within the discretion of the military. However, they have not cited any statute which would remove this so-called discretionary action beyond the scope of review under the A.P.A. Had this case been determined to rest on an issue involving abuse of discretion, the Court expresses such doubt as to whether the facts could have presented even a prima facie case of clear and unequivocal abuse. Thus, jurisdiction would have been denied.

The Court notes that even discretionary actions must initially conform to the regulations which the military has established for itself. *U.S. v. Heffner*, 420 F.2d 809 (C.A. 4th 1969). To do otherwise would constitute a denial of procedural due process. Thus, review of whether the regulations have been carried out in a reasonable manner is appropriate.

As a second jurisdictional objection, the defendants urge this Court to follow a policy of non-intervention. *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orlaff v. Willoughby*, 345 U.S. 83 (1953). The Court notes the desirability of this policy especially in military cases where courts should

avoid having to "second-guess judgments requiring military expertise." *Mindes v. Seaman*, 453 F.2d 197, 199 (C.A. 5th 1971). However, the issue before this Court is not essentially military in nature, nor is it one involving medical expertise. Instead the issue is whether certain regulations were interpreted and carried out in a manner which was arbitrary and capricious. Thus, the Court is not intervening in essentially military matters by accepting this case for review.

Although, as the defendants contend, the Court should not accept such a case where adequate relief exists within the administrative channels of the agency, no such relief is found to exist here.

The only possible administrative remedy not pursued is an appeal to the Board of Corrections of Military Records. There is doubt as to whether resort to such agency would be other than futile. Since undisputed jurisdiction and an adequate remedy are both necessary to justify dismissal for failure to exhaust an administrative remedy and neither is clearly present, the Court must not dismiss the action on that ground.

In light of the jurisdictional basis under which this case is presently before the Court, the consideration of a Motion for Summary Judgment appears to the Court to be particularly appropriate. The Court, as reviewing agent, is permitted under §706 as necessary "to decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action." A hearing has been held on the interpretation of the applicable regulation. Thus if the Court finds that no issue as to a material fact exists and that the defendants are entitled to judgment as

a matter of law, summary judgment should be granted. Upon examining the motion, plaintiff's response and other relevant material, the Court finds that the motion of the defendants for summary judgment should be granted indeed.

The pertinent facts do not seem to be in dispute. Instead plaintiff's cause of action rests upon an unsubstantiated interpretation of the regulations and defendants' actions in relation to those regulations defining waiver requirements. The series of events surrounding the grant and subsequent denial of the waiver are crucial to resolving the issue before the Court, thus they are set out briefly below:

Sept. 9, 1972 — Plaintiff had annual physical as required in Air Force Manual (AFM) 160-1, 1-7a(2).

Oct. 19, 1972 — plaintiff received notification that he was "medically incapacitated" as a pilot; the notice stated: "Recommend USAF SAM (USAF School of Areospace Medicine) evaluation in accordance with AFR 161-23."

Nov. 10, 1972 — plaintiff had a cardiac evaluation performed by a private hospital and results were sent to SAM.

Jan. 3, 1973 — Chief of Flight Medical Branch Clinical Sciences Division at SAM notified plaintiff that he concurred with the findings of the private physician, but he went on to say, "we would like to evaluate the patient

at USAF SAM prior to consideration of waiver . . . ." A tentative examination date was set for February 7, 1973.

Feb. 3, 1973 — a letter from USAF Surgeon General requested plaintiff be evaluated at USAF SAM in October 1973 (changing the Feb. 7 date).

Feb. 20, 1973 — a waiver was granted with a terminal date of November 30, 1973.

October 1973 — Plaintiff did not report to SAM, but instead underwent another private evaluation.

November 20, 1973 — letter from Reserve Surgeon General stated plaintiff's waiver for the next period was withheld because his previous waiver had been conditioned upon his being evaluated by SAM in October of 1973, and said condition had not been fulfilled.

According to the regulations, a waiver may be granted in plaintiff's case only by the Headquarters of the United States Air Force (HQ USAF). Air Force Manual (AFM) 160-1, 3-6(d)(3). The basis for plaintiff's disqualification, a left bundle-branch block, is a cause for rejection of a waiver until a "cardiac evaluation by the USAF's School of Areospace Medicine has ruled out cardiac disease." AFM §160-1, 4-20(b)(2). Plaintiff claims that in his case this requirement has been substantially met by his sending the results of the private examination to the school. Plaintiff further refers the Court to the fact that each letter he

received stated that he was "requested" to go to the School rather than ordered to do so. The semantic niceties of using "recommend" rather than "order" do not allow plaintiff to deny that he was told on more than one occasion that his actual examination at the School was a condition of continuation of the waiver. Memorandum of telephone conversation, November 29, 1973, between Col. Harold Dietz and plaintiff; Notice of Chief of Flight Medical Branch Clinical Sciences Division at SAM, January 3, 1973.

Further, plaintiff places great importance upon the fact that no change in his physical condition occurred between his two private evaluations. The regulations provide that, where a waiver is granted for a defect which is static and not expected to change, the term of the waiver is indefinite subject to periodic examinations as required by the regulations for all personnel. AFM 160-1, 3-6c. However, where a defect is not considered static, the reviewing authority will place an expiration date upon the waiver. AFM 160-1, 3-6c. Clearly, in plaintiff's case the condition was not considered static since a termination date was given. Furthermore, where a pilot has developed a left bundle-branch block, as plaintiff has, the regulations have without exception been construed to require periodic evaluations at the School. Thus, applying this interpretation in plaintiff's case was certainly not arbitrary, but instead completely consistent with all previous applications.

Nor does this requirement appear to be capricious. The purpose of the evaluation at the School according to the Surgeon General's Office is to "have the same evaluation as other individuals with the same defect so that the risk factors can be properly assessed." Letter from Col. Harold

W. Dietz, Chief, Medical Standards Division, Office of the Surgeon General, to Maj. Stuart J. Menn, January 22, 1975. The tests submitted by the plaintiff do not permit such comparisons.

As one of several examples in the evidence, upon private examination plaintiff was only tested to 85% of his maximum ability on the Treadmill Exercise Tolerance Test. The School requires testing to the maximum ability.

Further, Col. Dietz maintains that the initial decision to allow waiver of this disability is based upon the fact that regular and uniform evaluations will be made by the School. He refutes the notion that any "study group" *per se* exists except to the extent that the results of the individual examinations are available for review. Plaintiff nowhere asserts that this is not the case.

Where an administrative agency has followed a consistent interpretation of a regulation, a strong presumption in favor of such interpretation arises. *Committee for Open Media v. F.C.C.*, 533 F.2d 1 (C.A. D.C. 1976); *U.S. v. Consolidated Mines and Smelting Co.*, 455 F.2d 432 (9th Cir. 1971).

In the present case, the defendants have consistently interpreted regulation 4-20(b)(2) to require an actual evaluation. No justification has been put forth for holding this interpretation to be unreasonable. In fact the costs to the plaintiff of private evaluations as well as the risk to the Air Force personnel of inadequate alternative evaluations seem to mitigate against any other interpretation.

Plaintiff has raised no factual issue as to this requirement. At most he has shown a misinterpretation, on his

own part, as to the conditions accompanying the granting of his initial waiver. However, more realistically he has only shown a subjective desire to avoid examination by the School of Areospace Medicine. No regualtion nor principle of law supports this desire. Therefore, no relief can be granted. The denial of a waiver was in compliance with a reasonable interpetation of the Air Force regulations and not, as plaintiff claims, a denial of a protected property interest in a manner which exceeded military authority.

Thus, the defendants' motion for summary judgment is hereby granted and the case is dismissed.

ENTER: This 20th day of December 1979.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

In The District Court Of The United States
For The Western District of Tennessee
Western Division

Civil Action
No. C-75-373

James C. Stephens

v.

United States of America, *et al*

HEARING ON
MOTION FOR SUMMARY JUDGMENT
August 12, 1977

APPEARANCES:

FOR THE PLAINTIFF: Mr. James L. Garthright, Jr.
and,
Mr. James L. Garthright III
Garthright & Garthright
Suite 1806
Exchange Building
Memphis, Tennessee

FOR THE DEFENDANT: Mr. Joe A. Dycus
Assistant United States Attorney
1028 Federal Building
Memphis, Tennessee

THE COURT: Now, we have this motion in the Stephens case. Mr. Dycus, are you handling this for the Government?

MR. DYCUS: Yes, Your Honor.

THE COURT: Let me make this observation.

We included some directions in the notice setting the hearing on the motion, primarily because our research suggested that whether or not the regulations included some administrative discretion as opposed to medical discretion in a matter of this sort. That was the main thrust of this. But we are prepared to hear counsel on the motion.

MR. DYCUS: Your Honor, I didn't realize the Court's request and didn't have the administrative loss of discretion of the Air Force. Part of the documents filed is a Department of the Air Force Medical Standards, and also in Chapter 3 of the Administrative Guidelines, and part of that is waivers, and that is not included here.

I don't know whether Mr. Garthright has a copy of the regulations in regard to waivers or not.

THE COURT: All right, we will hear from Mr. Garthright.

MR. DYCUS: Shall I proceed, Your Honor, or do you want to hear from them first?

THE COURT: That's right, it is your motion. All right, go ahead, we will let you go first.

(Thereupon, argument on the motion was presented by Mr. Dycus and Mr. Garthright, after which the following occurred:)

THE COURT: All right, Mr. Dycus, could you obtain for me those regulations that we talked about at the commencement of the hearing?

MR. GARTHRIGHT: Your Honor, we have them, and we will be glad to Xerox them for the Court.

MR. DYCUS: I would like to know what the regulations state in regard to agency if they would want to read them. Is it Paragraph 36?

MR. GARTHRIGHT: It is Paragraph 36 or 3-3.

MR. DYCUS: We have those.

MR. GARTHRIGHT: He knows more about these than anybody else, Your Honor.

THE COURT: Government regulations are a problem.

All right, I am not going to be able to rule on it, primarily because my former law clerk who worked this up for me — I have worked on it but he did the research, and he seems to think these Administrative Regulations are significant. Our approach to the case goes along these lines.

The only way we could have any jurisdiction over this is under the Administrative Procedures Act, which is a general act, the purpose of which is to allow courts to make a review of proceedings or decisions or actions by the Executive Branch of the Government. If it were not for that Act then District Courts would not be sitting in judgment on matters of the military.

There is still a strong compelling principle recognized by the appellate courts that in certain phases of even the Administrative Procedures Act matters the Court should not interfere. That was brought home to me very emphatically by the Court of Appeals in a matter I had ruled on pertaining to another matter. Anyway, that is not in this case.

The Administrative Procedure Act does say that a Court just reviews decisions. It has standards and the standards are that the Act must be arbitrary and capricious, or be in the area of contractual rights.

There is an area of the law that says that if the Executive Branch does not comply with its own regulations then it is acting arbitrary.

You gentlemen have somewhat narrowed the dispute on the other hand by Mr. Dycus saying that the regulations allow them to say "well, you have to be examined", he says examined by the school. The Plaintiff says, "it is not an examination at all, that what is meant by examination has been furnished and will be furnished by we are not going to be put into the —" well, Mr. Garthright keeps using the word guinea pig. It is hard for me to conceive of that, I don't believe they are going to do some things like the C.I.A. are supposed to be doing. In any event there is a factual dispute there.

It is suggested that this is a — Well, I want to say disciplinary matter, or it is a matter whereby he is being denied something that he might otherwise have because he won't follow orders. That is why my law clerk thought Administrative Regulations might come into play. For example, if somebody told him to fly the airplane a certain place and he wouldn't do it there are ways that he could be disciplined with a proper hearing, and so forth. But we can't tell whether the Defendants assert some right under those regulations or have some rights. I am inclined to think that I can't grant a Motion to Dismiss or Motion for Summary Judgment under the medical part in the face of this factual dispute.

However, the reason I asked Mr. Garthright these questions, I want to emphasize that I am not sitting here reviewing what the military does. Otherwise we would have a whole court for that alone. Every time somebody was ordered to do something at Millington and he didn't want to do it he would be down here, and that's not our role, I don't think the Court ought to do that. The military has its business to run, and they don't need a Court telling them how to run their affairs.

I will ask Mr. Dycus to file that.

Now, I don't believe my holding is going to dictate that there was any duty to tell Mr. Garthright or anybody where to appeal, but that's customary. I don't know that it is Constitutionally mandated.

But if you will file that get that from them. Maybe Mr. Garthright, the younger, can go down there with you and you all can agree and bring them back up here.

I have a tentative ruling in my file but it is not typed and not final.

Is there anything else?

Now, if I overrule this motion how much preparation is necessary? Mr. Garthright, I have a hazy recollection that you told me on prior appearances that there is a good bit of discovery that needs to be done.

MR. GARTHRIGHT: Yes, sir.

THE COURT: None of it has been done because of this motion?

MR. GARTHRIGHT: That's why we discussed it with

Your Honor prior to this hearing, and Your Honor agreed it would be inappropriate to do that wide-spread medical discovery before we determined if we had a right to be here.

THE COURT: Is there a way that you can explore using doctors' statements? Although I am not bound by what was before the military, that is significant, because I am determining whether they acted arbitrarily.

MR. GARTHRIGHT: Yes, sir.

THE COURT: Maybe if you are going to bring in a lot of those things I will have to say if they knew about that they wouldn't be arbitrary.

MR. GARTHRIGHT: Nothing new.

THE COURT: What I am suggesting is, maybe you lawyers can agree that a letter that was gotten from a doctor can be made part of the record, and his chart from somewhere, you know, and —

MR. GARTHRIGHT: If they would accept that it would be all right with us.

THE COURT: Don't forget now, I am judging not a new set of facts about his medical condition, but whether they acted arbitrary in what they didn't do, you see.

MR. GARTHRIGHT: That is our reaction, we would be only bringing before Your Honor that medical that was available, and take out the fact that he is flying for the airline right now is indicative that he can fly.

THE COURT: You probably have ridden with him, Mr. Dycus, and didn't know it.

MR. GARTHRIGHT: There is probably no dispute about what the Air Force knew.

THE COURT: This would be a good time if you all would have a little session now. And would you bring the regulation up and we will get Mrs. LaFon to mark it filed.

I hereby certify that the foregoing 10 pages, to the best of my knowledge, skill and ability, are a true and correct transcript of my shorthand notes relating to the Hearing on Motion for Summary Judgment on August 12, 1977 in the case of:

James C. Stephens

v.

United States of America, et al

Civil Action No. C-75-373

This 7th day of March, 1980.

Brenda H. Pellicciotti
Official Court Reporter
United States District Court
Western District of Tennessee

MOTION OF DEFENDANTS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT IN THEIR FAVOR

Filed August 31, 1976

Defendants move, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this action on the grounds that the Court lacks jurisdiction over the subject matter of the action and the Complaint fails to state the claim upon which relief can be granted.

In the alternative, Defendants move that the Court grant summary judgment in their favor, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, on the grounds that there is no genuine issue as to any material fact and the Defendants are entitled to judgment as a matter of law.

In support of this Motion submitted herewith is a memorandum in support of motion to dismiss or, in the alternative, for summary judgment.

Respectfully submitted,

THOMAS F. TURLEY, JR.
United States Attorney

By: /s/ J. Richard Buchignani
Assistant United States
Attorney

[Excerpts from]

MEMORANDUM OF POINTS AND AUTHORITIES

[Filed by Defendants August 31, 1976]

In support of the defendants' Motion To Dismiss or in the Alternative for Summary Judgment this Memorandum of Points and Authorities is respectfully submitted along with the documents attached thereto.

FACTS

* * *

[Discussion of facts omitted].

* * *

LAW AND ARGUMENT

The plaintiff asserts that the Court has jurisdiction to review the discretionary actions of the defendants pursuant to 5 U.S.C., Section 701, et seq. (Administrative Procedure Act). Defendants contend that jurisdiction does not obtain under the A.P.A. because that Act is not a grant of jurisdiction.

* * *

[Discussion of Administrative Procedure Act omitted].

* * *

Nor may jurisdiction be found under the Declaratory Judgment Act, 28 U.S.C. 2201, 2202.

* * *

[Discussion of 28 U.S.C. §§2201, 2202 omitted].

* * *

Plaintiff's attempt to rely upon the terms of 28 U.S.C. §1343(4) for jurisdiction in this action is likewise of no avail.

* * *

[Discussion of 28 U.S.C. §1343(4) omitted].

* * *

Plaintiff also alleges that this court derives jurisdiction pursuant to 10 U.S.C., §1551, *et seq.*

* * *

[Discussion of 10 U.S.C. §1551 omitted].

* * *

Plaintiff also seeks to lodge jurisdiction in this court by way of 28 U.S.C. §1361, the mandamus statute.

* * *

[Discussion of 28 U.S.C. §1361 omitted].

* * *

In the body of the plaintiff's jurisdictional statement, he makes mention of the 5th and 14th Amendments to the United States Constitution. It is not clear whether the plaintiff views those Constitutional provisions as providing this court with jurisdiction to hear his lawsuit. However, it is clear that if he views them in such a light he is mistaken. The Amendments to the United States Constitution set out certain guaranteed rights. However, those amendments do not contain within themselves any independent grant of jurisdiction to any court to enforce the rights they describe. Assuming, *arguendo*, that plaintiff has suffered a deprivation of his rights under the 5th Amendment (the 14th

Amendment is unavailable to plaintiff because of his failure to allege the requisite state action), he must allege an independent source of jurisdiction before he can seek redress of that deprivation in the Federal courts.

Lastly, we submit that 28 U.S.C. §1331 is unavailable to this plaintiff as a jurisdictional basis for his lawsuit.

* * *

[Discussion of 28 U.S.C. §1331 omitted].

* * *

Until he has exhausted his available administrative remedies, plaintiff is barred from seeking judicial relief.

* * *

[Discussion of administrative remedies omitted].

* * *

In light of the foregoing, it is our conclusion that the District Court must grant a Motion to Dismiss this lawsuit. Moreover, a careful analysis of the allegations of the complaint, the applicable regulations and the facts surrounding this case reveals that the District Court must refuse to exercise jurisdiction in this case even if it determines that plaintiff has cited a colorable jurisdictional basis for his lawsuit. Basic to our position in this regard is our reliance upon the non-intervention principle set out by the Supreme Court in *Orloff v. Willoughby*, 345 U.S. 83 (1953), and followed in numerous cases since the date of that opinion.

* * *

[Discussion of scope of review and jurisdiction omitted].

* * *

Conclusion

On the basis of the foregoing facts and law, the Court is respectfully requested to grant the Defendants' Motion to Dismiss Or In The Alternative For Summary Judgment.

Respectfully submitted,

THOMAS F. TURLEY, JR.
United States Attorney

By: /s/ J. Richard Buchignani
Assistant United States
Attorney

[Excerpts from]
MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS AND SUMMARY JUDGMENT

[Filed by Plaintiffs October 22, 1976]

Plaintiff would respectfully submit this memorandum of points and authorities in response to Defendant's Motion to Dismiss and/or Motion for Summary Judgment.

The facts alleged in Plaintiff's Complaint set forth a cause of action cognizable by this Court, and that [sic] this Court has jurisdiction over the subject matter of said cause, pursuant to the following statutes and cases.

* * *

[Discussion of Administrative Procedure Act omitted].

* * *

Plaintiff submits that the instant complaint alleges facts which provide a cause of action for which relief may be sought pursuant to 28 U.S.C.A. §2201, *et seq.* Further, that said Chapter may serve as a basis for subject matter jurisdiction in the instant cause.

* * *

[Discussion of 28 U.S.C. §§2201, 2202 omitted].

* * *

Plaintiff would submit that the facts alleged in Plaintiff's complaint state a cause of action, relief for which may be granted pursuant to 28 U.S.C.A. §1343(4), in that said Section provides a Federal District Court with jurisdiction

of the subject matter when a Constitutional claim is pendent.

* * *

[Discussion of 28 U.S.C. §1343(4) omitted].

* * *

Plaintiff further submits that allegations contained in plaintiff's Complaint that his Constitutional Rights of Due Process have been violated by defendants in refusing to act to grant a medical waiver where required by Air Force Regulations, constitute an Act of Congress [5th Amendment] within the meaning of Sub-Section 4 of Section 1343, Chapter 28 of the U.S. Code, in that said amendment provides "for the protection of civil rights" within the meaning of said Chapter, Section and Subsection.

Plaintiff submits that the facts alleged in plaintiff's Complaint state a cause of action for which relief may be granted, pursuant to 28 U.S.C.A. 1361, and further, that said Chapter and Section provide a Federal District Court with subject matter jurisdiction where an allegation of an infringement by Federal Officers of a Constitutionally protected right is alleged.

* * *

[Discussion of 28 U.S.C. §1361 omitted].

* * *

Plaintiff submits that the facts alleged in plaintiff's Complaint set out a cause of action for which relief may be granted pursuant to 10 U.S.C.A. §1551, *et seq* and that the Federal District Court was provided with subject matter

jurisdiction under said acts in conjunction with the Administrative Procedure Act, 5 U.S.C.A. 701, *et seq*, and that the acts complained of as alleged in the Complaint are reviewable by a Federal District Court pursuant to 10 U.S.C.A. §1551, *et seq* and 5 U.S.C.A. 701, *et seq*.

* * *

[Discussion of 10 U.S.C. §1551 omitted].

* * *

[Discussion of administrative remedies omitted].

* * *

Plaintiff submits that the facts alleged in plaintiff's Complaint regarding a deprivation of plaintiff's constitutionally guaranteed right of substantive and procedural due process and effective taking of a property interest without due process safeguards constitutes substantial Federal question within the intentment and purview of Chapter 28, Section 1331 of the United States Code Annotated, invests this Court with original jurisdiction to hear and determine the merits of plaintiff's cause of action.

* * *

[Discussion of 28 U.S.C. §1331 and scope of judicial review of military decisions omitted].

* * *

Conclusion

The allegations contained in plaintiff's Complaint in the instant cause present [a claim cognizable] at law and upon which relief may be granted. Briefly, plaintiff has

alleged that in violation of Air Force Regulations, defendants arbitrarily refused and failed to issue to plaintiff a medical waiver which would allow him to continue his career with the Air Force Reserve in a pilot position, when theretofore such waiver had been issued based upon medical facts, accepted and approved by defendants and such waiver granted under the appropriate Air Force Regulations. That the allegations contained in plaintiff's Complaint are sufficient to show that if such conduct on the part of defendants continues, that he will suffer severe economic loss, and that said conduct in addition to extinguishing a property right without the benefit of procedural and substantive due process and equal protection under the Constitution, denied to plaintiff, the liberty to choose where qualified, the type of career he may enjoy with the Air Force Reserve.

That where plaintiff has alleged as briefly stated above violations of Constitutional Rights and of administrative regulations, under the Administrative Procedure Act this court may assume subject matter jurisdiction and provide plaintiff with full and complete hearing on the merits of plaintiff's cause of action. Additionally, this court has subject matter jurisdiction under 28 U.S.C.A. §1331, in that jurisdiction in a Federal question matter is tested under the Fifth Amendment to the Constitution where unconstitutional governmental action is alleged. That this court may grant jurisdiction in the instant cause pursuant to 28 U.S.C.A. §§ 2201 and 2202, the Declaratory Judgment Act, in that a Federal District Court always has discretion to exercise jurisdiction thereunder. Further, that this court may exercise subject matter jurisdiction of the instant cause under provisions of 28 U.S.C.A. §1343(4), in that

plaintiff has alleged deprivations of his Constitutional Rights of due process, and traditionally district courts have found such jurisdiction where a Constitutional claims is pendent. This court is vested with subject matter jurisdiction under the provisions of 28 U.S.C.A. §1361, in that the instant cause alleges an infringement by Federal officers of a Constitutionally protected right. Further, that this court may exercise subject matter jurisdiction of the instant cause under the provisions of 10 U.S.C.A. §1551, *et seq*, in that Federal District Courts are provided with such jurisdiction under that Act, and in conjunction with the Administrative Procedure Act, 5 U.S.C.A. 701, *et seq*, in that Acts under the A.P.A. are reviewable by the district court where decisions are final and no adequate remedy is available.

Respectfully submitted,

By: _____

GARTHRIGHT & GARTHRIGHT
Attorneys for Plaintiff

[Excerpts from]
COMPLAINT

[Filed August 13, 1975]

I.

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 5 U.S.C.A. Section 701, et seq; 10 U.S.C.A. Section 1551, et seq; 28 U.S.C.A. Sections 1331, et seq; 1343(4); 2201, et seq and 1361; Fifth and Fourteenth Amendments to the Constitution of the United States; and that this is a suit for declaratory, injunctive and other relief, including, but not limited to, damages both compensatory and punitive and to secure the perfection of and to redress the deprivation of the rights secured by the above statutes and the Fifth and Fourteenth Amendments to the Constitution of the United States; and that the matter in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs; and

* * *

13. That, shortly thereafter, plaintiff called the defendant Colonel Harold M. Dietz, Chief Medical Standards Division, Office of the Surgeon General, and inquired of him if there were any indication of a change in his physical condition; that said defendant stated there was not, but that the plaintiff was the only person flying in the Air force with a left bundle-branch block not participating in the Study Group and, as such, was jeopardizing the entire program, and that if plaintiff wanted to fly he would go to the Study Group every year; and

14. That plaintiff alleges that there did not exist, nor

was there ever shown him a single item received from any medical source indicating an adverse change in his physical condition, which, under the proper and duly exercised rules and regulations which indicated an adverse change in his physical condition, which would not entitle him to a waiver or to current flying status; and

* * *

24. That such action on the part of defendants, individually and concertedly, under the facts and circumstances existing, were improper, arbitrary, capricious and exceeded the authority under which they were required to operate; and that such action violated the property, personal and civil rights of the plaintiff, denying him both substantive and procedural due process and equal protection under the involved rules and regulations, statutes, Constitution of the United States and Fifth and Fourteenth Amendments thereto; and

* * *

/s/ JAMES C. STEPHENS
Plaintiff

GARTHRIGHT & GARTHRIGHT
By James L. Garthright, Jr.
Attorneys for Plaintiff
1806 Exchange Building
Memphis, Tennessee 38103

STATE OF TENNESSEE:

COUNTY OF SHELBY:

The undersigned, being sworn, makes oath that the facts and statements contained in the foregoing Complaint are true of his own knowledge, information and belief.

/s/ JAMES C. STEPHENS.

SUBSCRIBED AND SWORN TO before me, this 12th day of August, 1975.

JAMES L. GARTHRIGHT, JR.
NOTARY PUBLIC

My Commission Expires:
5/29/77

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.